FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARIZONA

BRIEF OF THE STATE BAR OF NORTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF THE STATE BAR OF ARIZONA

RUFUS L. EDMISTEN
ATTORNEY GENERAL
STATE OF NORTH CAROLINA

ANDREW A. VANORE, JR.
Senior Deputy Attorney General

NORMA S. HARRELL
Associate Attorney General

Counsel for THE STATE OF NORTH CAROLINA
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

H. D. COLEY, JR.
Counsel to North Carolina State Bar
Post Office Box 25850
Raleigh, North Carolina 27611

HARRY W. McGALLIARD
OF COUNSEL
Post Office Box 25850
Raleigh, North Carolina 27611

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INTEREST OF THE AMICUS CURIAE

The questions presented at the case at bar apply equally to North Carolina and the North Carolina State Bar as to the

State of Arizona. North Carolina prohibits advertising or solicitation of any kind by attorneys through a variety of provisions. North Carolina General Statutes §84-38 makes it a crime for any person or group, directly or indirectly, for themselves of for others, to solicit or procure through solicitation any legal business. In addition, North Carolina General Statutes §84-28 provides that an attorney may be subject to disbarment, suspension for not more than three (3) years, public censure, or private reprimand for violating the Code of Professional Responsibility adopted and promulgated by the Council of the North Carolina State Bar. The North Carolina State Bar has adopted the Code of Professional Responsibility with its prohibition on most advertising and solicitation by attorneys. Pursuant to North Carolina General Statutes §84-21, these rules must be and have been approved by the Chief Justice of the North Carolina Supreme Court and made official by their entry on the minutes of the Supreme Court of North Carolina.

If the advertising prohibition for attorneys in the State of Arizona is invalid, then in all probability the advertising prohibition for attorneys in the State of North Carolina is also invalid. North Carolina has substantial interests in assuring ethical and professional standards of its attorneys and in maintaining the effectiveness of the legal system. A decision in the instant case which, because of the similar provisions prohibiting most advertising by attorneys in the states of North Carolina and Arizona, indicated that the North Carolina advertising prohibition on attorneys was invalid would be inconsistent with the determination by the State of North Carolina that advertising prohibitions or restrictions on attorneys are essential for the legal profession and the legal system. Invalidity of the advertising prohibition would require a monumental task of re-structuring the methods of regulating attorneys' ethical and professional standards.

In addition, the prohibition on attorneys advertising in North Carolina is currently being challenged in the Eastern District of North Carolina in the case of *Williams, et al. v. North Carolina State Bar, et al.*, in which a three-judge court has been convened but no date has been set for briefs or arguments. That case, similarly to this case, presents the pure question of the validity of the prohibition against attorneys advertising by an attorney who advertised that he would provide uncontested divorces for $100 plus $18 court cost, by other attorneys who joined in the suit, and by consumers asserting their right to receive the information which attorneys might communicate to them in advertisements in the absence of the prohibition against attorneys advertising.

QUESTION

WHETHER STATES MAY PROHIBIT ATTORNEYS FROM ADVERTISING.

SUMMARY OF ARGUMENT

It has long been established that the States have the authority and responsibility to regulate at least certain professions in the public interest and welfare. States have a particular interest and responsibility to regulate the legal profession because of the essential role that lawyers play in the administration and functioning of the legal system and because of the public service role of attorneys in the practice of law.

The policy against advertising is wide-spread and of long standing.It has its roots in the concept of law as a profession by which attorneys render a public service. Public confidence and trust are essential for the effective functioning of the legal system. Advertising would focus on matters which are often irrelevant to the choice of an attorney, to the

determination of whether and what legal services are involved, and to the evaluation of a particular attorney. The spectacle of attorneys advertising would emphasize the skill of, and money invested in, the advertising to the detriment of the public's view of attorneys. It would also encourage emphasis of public image and profit motive.

Advertising has also been long condemned because of its tendency to encourage the stirring up of litigation. Solicited claims are more likely to be fraudulent and are less likely to be meritorious than those that are initiated independently by the consumer. Public policy also favors peaceful settlement of disputes whenever possible, and advertising and soliciation would operate against this public policy.

Attorney advertising would also enhance advantages of the least scrupulous over the more ethically inclined and self-restrained attorneys. It would consequently divert clients to the least ethical and least desirable attorneys. The temptation on otherwise ethical attorneys to advertise in ways in which they would not normally be inclined to promote themselves or their services would be great because of the need to complete with the less restrained attorneys.

Advertising by attorneys would be inherently deceptive and misleading. It is impossible to know in advance all the legal services that a consumer might need, so the choice of an attorney by a consumer on the basis of the advertisement for a particular service would have a misleading and deceptive effect upon the client. Moreover, consumers cannot evaluate the quality of legal services, and advertising would contribute to their confusion in this respect.

Even price advertising is inherently deceptive and misleading. No legal services can be completely standardized, so one cannot know whether the price advertised by one

attorney for a particular service is comparable to the price advertised by another attorney for what is supposedly the same service. Advertising an hourly rate with a range of hours that might be involved is equally misleading since the consumer cannot know whether his needs will fall at the low or high point in the range of hours needed. A client does not know whether an attorney is a slow or fast worker, so a lower hourly rate for one attorney may actually end up in a higher cost than another attorney who charges a higher hourly rate.

If only misleading and deceptive advertising were prohibited, assuming that attorney advertising is not inherently misleading and deceptive, a method for enforcing the restrictions would have to be devised. The difficulty in determining which advertisements were misleading or deceptive would require a great deal of time and attention to the question of which advertisements should be prohibited. A system for enforcement of such restrictions would have to be established, requiring a great deal of manpower and expense. Even if a good job were done on policing advertisements, the deceptive or misleading character of many could not be established until after a consumer had suffered. It would be virtually impossible to provide for the compensation of consumers for losses resulting from misleading or deceptive advertising because of the problems of proof of the deceptive and misleading character of the advertisement, proof of causation, and proof of loss.

The removal of the prohibition on most advertising would also reek havoc within the profession. The cost of advertising would make it difficult for many attorneys to enter the field. The young attorney who can now begin to compete with a relatively small capital investment compared to many other professions would need the additional resources to advertise as much as or more than attorneys who have established reputations and are also advertising.

Moreover, the cost of advertising would increase the cost of legal services. Attorneys cannot achieve the same economies of scale that may be possible in commercial endeavors. Moreover, advertising of legal prices might lead to price cutting and price competition, the effects of which could include forcing attorneys either to suffer losses which could destroy their practice or to decrease the quality of services. Price cutting could also lead to supplying some services at a loss and thus overcharging clients who needed other services in order to make up the loss.

The advertising restrictions on attorneys do not violate the First Amendment. Although commercial speech has now been recognized as clearly protected by the First Amendment, advertising for commercial speech must be viewed differently from speech intended purely to communicate ideas for First Amendment purposes. In weighing the advertising restrictions against First Amendment interests, the special need and responsibility of the State to regulate professions, and especially the legal profession, must be considered. Advertising of legal services or legal fees differs from advertising of drug prices in that legal services are not prepackaged and are not easily defined and comparable as drugs generally are. Also, when a consumer is buying drugs he already has a prescription from a physician who has determined whether he needs medication and what medication is appropriate. When a consumer goes to an attorney, he may be attracted by an advertisement for a service which is not what he really needs and may be misled in his reliance on the advertisement.

Advertisement restrictions do not run afoul of the Sherman Antitrust Act. Advertising restrictions in most states, and specifically in both Arizona and North Carolina, are either embodied in statutory provisions or in rules of the State Supreme Court. As such, they represent the action of the State as a sovereign and are exempt from the Sherman

Antitrust Act under the *Parker v. Brown* so-called "State action" exemption. Even if the State action exemption were not considered available, the advertising prohibitions would have to be analyzed under the "rule of reason." The vital interests and policies promoted by State prohibitions on attorneys' advertising are reasonable and consequently could not violate the Sherman Antitrust Act.

ARGUMENT

THE STATES MAY VALIDLY PROHIBIT ATTORNEYS FROM ADVERTISING.

A. CASE LAW ON REGULATION OF PROFESSIONS.

The Authority of States to regulate professions has long been upheld by numerous decisions of the United States Supreme Court, the inferior federal courts, and the various courts of the states. In *Semler v. Oregon State Board of Dental Examiners*, this Court dealt with a challenge to the validity of statutory restrictions against advertising by Oregon dentists:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a

> public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935). See also *Williamson v. Lee Optical of Okalhoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Similarly, this Court upheld a New Mexico restriction against advertising by optometrists which was designed to "protect . . . citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbook rather than the remedial reguirements of their eyes." *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed. 2d. 983 (1963). In many similar cases, the Court has denied certiorari, affirmed without opinion, or similarly dismissed the appeal. E.g., *Dr. Bloom Dentist v. Cruise*, 288 U.S. 588, 53 S.Ct. 320, 77 L.Ed. 968 (1933) (per curiam; *Johnson v. Board of Dental Examiners* 134 F.2d. 9 (D.C. Cir. 1943), cert. den. 319 U.S. 758; *Toole, et al. v. State Board of Dentistry*, 300 Mich. 180, 1 N.W.2d. 502, app. dismissed 316 U.S. 648, 62 S.Ct. 1299 (1942). Moreover, a State's responsibility and broad authority to regulate professions for the protection of the public welfare and promotion of the public interest does not stop with the prevention of untruthful advertising. "In framing its policy the legislature was not bound to provide for determinations of the relevant proficiency of particular practitioners. The legislature was entitled to consider the general effects of the

practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement." *Semler v. Oregon State Board of Dental Examiners*, 249 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

More than most professions, law has been recognized as an area in which the State has a particular duty and authority to exercise its control over the standards of the profession.

> "History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the Bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. . . . It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the courts in search of a just solution to disputes." *Cohen v. Hurley*, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed. 156 (1962).
>
> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interest they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . The interest of the

> States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975).

Since lawyers are officers of the courts, the State should have control over those persons granted the privilege of becoming lawyers and thereby becoming instruments "to advance the ends of justice." *Theard v. United States*, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed. 1342 (1957). See also *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed. 2d 749 (1971); *Application of Stolar*, 401 U.S. 23, 91 S.Ct. 713, 27 L.Ed.2d. 657 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed. 2d. 428 (1963); *Konigsberg v. State Bar of California* 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed. 2d. 810 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 3d. 796 (1957).

B. THE POLICY AGAINST ADVERTISING: JUSTIFICATION

The policy against advertising is widespread and of long standing. It has its roots in the concept of the practice of law as a profession and in the legal profession's view of the role it plays in society.

> "Historically, the practice of law is a profession. It must remain a profession if the purposes of representation in litigation as part of the machinery of justice are to be achieved. A profession is a group of men pursuing a learned

> art as a common calling in the spirit of public service—no less a public service because incidentally it may be a means of livelihood. . . . In a profession, on the other hand, it [the gaining of a livelihood] is an incidental purpose, pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided. . . .
>
> "There is no such thing as competition for clientage in a profession. Every lawyer should exert himself fully to do his tasks of advice, representation, and advocacy to the best of his ability. But competition with fellow members of the profession in any other way is forbidden. Competition belongs to activities which are primarily acquisitive. It is not allowable in those primarily for public service." R. Pound, *Jurisprudence*, 676-77.

And Dean Witmore has similarly stressed the importance of the concept of law as a profession:

> "For lawyers, the most important truth about the law is that it is a profession. . . . As a profession, the law must be thought of as ignoring commercial standards of success—as possessing special duties to serve the state's justice—and as an applied science requiring scientific training. And, if it is thus set apart as a profession, it must have traditions and tenets of its own, which are to be mastered and lived up to. This living spirit of the profession, which limits yet uplifts it as a livelihood, has been customarily known by the vague term 'legal ethics.' There is much more to it than rules of ethics. There

> is a whole atmosphere of life's behavior. What is signified is all the learning about the traditions of behavior that mark off and emphasize the legal profession as a guild of public officers. And the apprentice must hope and expect to make full acquaintance with this body of traditions, as his manual of equipment, without which he cannot do his part to keep the law on the level of a profession." (Foreword to Carter's, *The Ethics of the Legal Profession*, 1915).

The essential link between law as a profession and the prohibition on advertising and solicitation have been recognized by countless commentators and in countless cases over the years. *See e.g., Jacksonville Bar Association v. Wilson*, 102 So.2d. 292 (1958); *In re Rothman*, 12 N.J. 528, 97 A.2d. 621 (1953); *in re Cohen*, 261 Mass. 484, 159 N.E. 495, 55 A.L.R. 1309 (1928); *In re Schwarz*, 195 App. Div. 194, 186 N.Y.S. 535 (App. Div. 1921), affirmed 231 N.Y. 642, 132 N.E. 921 (1921). Nor is the view confined to the United States. "There are rules of conduct which all professional men must observe. Refraining from advertising would, I think, clearly be one." F. A. R. Bennion, *Professional Ethics: The Consultant Professions and Their Code*, p. 149 (1969). However, it is not enough simply to assert that a prohibition or at least restriction on advertising is essential to the preservation of the practice of law as a profession and its integrity. It is necessary to go further and establish the link between this concept and the benefits which redound to the public, both directly and indirectly. The concept of lawyers as members of a profession:

> "... is not a fancied conceit, but a cherished tradition, the preservation of which is essnetial to the lawyer's reverence for his calling–as well as to his regard and esteem for his fellows at the Bar.

> This latter consideration is much more potent than is commonly supposed. Although, prompted by material success, some lawyers may profess indifference to the good opinion of their fellows, actually none is thus indifferent, but each craves such recognition, the more strongly the older he grows.
>
> "Furthermore, advertising, solicitation, and encroachment on the practice of others does not tend to benefit either the public or the lawyer in the same way as in the case of the sale of merchandise. While extensive advertising would doubtless increase litigation, this has always been considered as against public policy. Also, many of the most desirable clients, imbued with high respect both for their lawyer and his calling, would have no use for a lawyer who did not maintain the dignity and standards of his profession and would instinctively resent any attempt by another lawyer to encroach on their relation. Also, in so much as lawyers are officers of the court, advertising and solicitation by them would lower the whole tone of the administration of justice.
>
> "Reasons frequently given for the rules proscribing advertising and soliciting are, in addition to commercializing the profession, the tendency of such practices to stir up litigation, the evil effect on the ignorant of alluring assurances by the solicitous, as well as the temptation and probability that the lawyers who advertise and solicit would use improper means to make good their extravagant inducement."
> Henry S. Drinker, *Legal Ethics* pp. 211-12 (1953).

Public confidence and trust in lawyers are essential to the profession. Lawyers deliver a specialized service which cannot readily be evaluated by the average person. The legal profession can function as it should only if the public has the confidence and trust which will lead it to turn to lawyers when a legal problem arises or may exist. Will the public retain this confidence and trust, or be likely to develop it, if a lawyer can "advertise his talent, skill, and ability as merchants advertise their wares, much less call for business like a chimney sweeper"? *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933) (per curiam). Will the public believe an attorney is motivated by the spirit of public service and the considerations of fiduciary obligation obligatory on the effective functioning of the legal profession and the system of the administration of justice if the attorney is advertising and thus emphasizing a profit motive rather than the public service spirit? See Note, "Advertising, Solicitation and Legal Ethics," 7 Vanderbilt L. Rev. 677, 684 (1954).

Advertising focuses attention on images and on inducements which are expected to bring in business, not necessarily on the factors which should be of primary significance in determining whether a lawyer is needed and which lawyer should be consulted. According to Dr. Johnson, "Promise, promise is the sole of an advertisement." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, p. 153 (1959). Do we want consumers to choose their lawyers on the basis of how good a T.V. image they project? "Even the most ardent consumer advocate will admit that Madison Avenue has not always been a boon to the consumer, that too often flashy labelling or cute commercials obscure the question of quality." Barbara A. Stein, " Is Professional Advertising Unprofessional?" 12 Trial 26, 37 (June 1976).

Even if we do not have to face this specter of staged "candid" shots of the advertising attorney in between our

television programs, the quality of the advertising in terms of its packaging and appeal to consumer psychology will inevitably play a significant role in attracting consumers to particular lawyers and encouraging or discouraging them from consulting lawyers in general. "Susceptible as we are to advertising the public would then be encouraged to choose an attorney on the basis of which had the better, more attractive advertising program rather than on his reputation for professional ability." *Florida Bar v. Nichols*, 151 So.2d. 257, 268 (Florida 1963) (O'Connell, J. concurring in part and dissenting in part).

" To choose a consultant [i.e., attorney] on the basis of the skill of his advertising agency and the amount of his publicity spending, rather than on the advice of a disinterested, informed third party could scarcely profit the public." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, p. 204 (1969). Thus, the nature of advertising and its focus on elements which will sell the product–here, the attorney–in its inherent emphasis on the profit-seeking motive of the attorney, and in its highlighting of factors that may be irrelevant to the choice of an attorney or to the seeking of legal services, leads to the inescapable conclusion that advertising by attorneys would not redound to the public interest. Even the simplest ad setting out the charge for the most definable legal service available, if there is one, will vary in its effect on consumers according to the size, the layout, and the position and medium through which it is disseminated. If attorneys advertise, consumers will view them as being primarily in the business of promoting their services for their own benefit, not as devoted to the public good as the legal profession demands that they be. Advertising consequently can only injure the public confidence and trust in attorneys that is essential if the public is to turn to attorneys when legal services are needed.

Still another purpose of the prohibition on advertising by attorneys is the need to prevent the stirring up of litigation by attorneys. See, e.g., *Jacksonville Bar Association v. Wilson*, 102 S.2d. 292 (Florida 1958); *In re Davidson*, 64 Nev. 514, 186 P.2d. 354 (1947); Note, *"Goldfarb v. Virginia State Bar*–Applying the Antitrust Laws to the Legal Profession," 19 Howard L. J. 149, 157 (Spring 1976); Note, "Advertising, Solicitation and Legal Ethics," 7 Vanderbilt L. Rev. 677. 684 (1954); Drinker, *Legal Ethics*, 212 (1953). Lawyers should not be in the business of encouraging and fomenting litigation. The role is to help people with legitimate grievances either to settle them peacefully or to achieve the best possible resolution of their grievances through whatever appropriate litigation or other means are available.

> "A very important part of the advocate's duty is to moderate the passions of the parties, and, where the case is of a character to justify it, to encourage an amicable compromise of the controversy. It happens too often at the close of protracted litigation that it is discovered, when too late, that the play has not been worth the candle, and that it would have been better, calculating everything, for the successful party never to have embarked in it . . ." G. Sharswood, *An Essay on Professional Ethics*, 109 (5th Ed. 1907).

Solicited claims are more likely to be fraudulent than other claims, or at least less likely to be substantial and worthy of pursuit through the judicial system. Although this problem is less severe in advertising than in person-to-person solicitation, even a printed advertisement setting out the fees for a particular type of litigation can induce a consumer to bring a suit which he would not otherwise have instigated and which is not meritorious. Even critics of the ban against

advertising and solicitation recognize that this prohibition has contributed towards holding down the number of fraudulent and niusance-value lawsuits. See, e.g., Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys," 62 Virginia L. Rev. 1135, 1162 (Oct. 1976); Note, "A Critical Analysis of Rules Against Solicitation by Lawyers," 25 Univ. of Chicago L. Rev. 674 (1958). Solicitation has been and continues to be against public policy because of its tendency to stir up litigation in situations in which there is no meritorious claim, the claim is fraudulent, or the parties would otherwise settle the claim peaceably through informal methods. *Jacksonville Bar Association v. Wilson*, 102 So.2d. 292 (Florida 1958); Henry S. Drinker, *Legal Ethics*, 212 (1953). Advertising would enhance the means by which a lawyer could intentionally or unintentionally stir up litigation and thus work against the public interest and the effective administration of the legal system.

Allowing attorneys to advertise would promote the interests of the least scrupulous while placing the more restrained and ethically inclined attorneys at a disadvantage. Of course, this argument is true to some extent of all advertising. However, attorneys provide specialized services which may mean the differences between life and death, liberty and imprisonment, possession of property or loss of property, or otherwise affect consumers in crucial ways. The consumer is less able to judge the efficacy of an attorney's services and the validity of his advertising claims than the relative merits of various color televisions and color television salesmen. He can see whether the television works or not. He does not know whether the attorney has successfully represented him. Even if the attorney wins a case for him, how does he know whether the case should have been susceptible of an advantageous settlement without litigation? How does he know that another attorney might

not have been able to win it more expeditiously and more economically? If the attorney loses the case, how does he know for sure whether the undesirable outcome is the result of the attorney's ineptness or dishonesty or whether it was unavoidable? How does he know whether or not he received bad advice from the attorney in the first place in the attorney's recommendation that he pursue the claim? All these and other problems involved in clients' evaluating attorneys' services make the advantages which advertising affords to the less scrupulous loom much more significant when contrasted to the idea of a "free enterprise" legal profession.

"Advertising by any professional man inevitably involves self-praise and puffing. If competitive advertising among lawyers were permitted, the conscientious, ethical practitioner would be inescapably at the mercy of the braggart." *In re Rothman*, 12 N.J. 528, 97 A.2d. 621 (1953). "The securing of business by solicitation and advertisement creates so great a desire to 'deliver the goods' according to representation, that the temptation to use ill means is greatly increased. This in itself justifies the prohibition against solicitation and advertising." Harrison Hewitt, "Review of Codes of Ethics by Edgar L. Heermance," 35 Yale L.J. 391, 392-93 (1926). Accord, *Jacksonville Bar Association v. Wilson*, 102 So.2d. 292 (Florida 1958). Not only is it a disservice to members of the profession for the unscrupulous to reap the advantages they may derive from improper advertising, but it is the consumers, especially the most vulnerable consumers, who are most hurt by the attractive and misleading inducements proffered by the unethical advertising attorney.

> "If barristers were permitted to advertise, the advantages would go, not to the best qualified, but to the barrister with the longest purse and

> the least scruples. If the choice of barristers came to /be made by the general public on the strength of advertisement, the choice would tend to be more ill-informed and the public not so well served as at present." Bennion, Professional Ethics: The Consultant Professions and Their Code, 154 (1969), quoting the Bar Council.
>
> "Further, Those attorneys with the greatest incentive to advertise might include those most willing to engage in deception. An attorney who cannot attract clients thorugh reputation needs advertising. He might lack reputation for a number fo reasons: because he is new in town; because his clients cannot easily gather reputation information; or because he is incompetent or untrustworthy. To the extent that advertising provides attorneys in the last category with a method of attracting business, it will divert clients to those members of the bar most likely to disregard professional duties." Note, "Sherman Act Scrutiny of Broad Restraints on Advertising and Solicitation by Attorneys," 62 Virginia L. Rev. 1135, 1160 (Oct. 1976).

This very interest in preventing temptation and the deflection of clientele to the least scrupulous practitioners has been recognized by the Supreme Court in regard to dentists.

> "The community is concerned with the maintenance of professional standards which will assure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical

> relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."
> *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 612, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

It is the consumers who will benefit from the prohibition on advertising which prevents the unscrupulous and unethical attorney from attracting increasing amounts of business through the use of misleading and unfair advertising. An advertisement which may not look unfair or deceptive to the consumer, who lacks the specialized knowledge to evaluate it, may attract a client to the unscrupulous attorney. It is the client who suffers from the deception, dishonesty, or incompetence of the attorney who gains the client's patronage by such means. The difficulty of competing with the less scrupulous attorneys may make it impossible for ethically-minded attorneys to compete successfully with those who would use unfair or deceptive advertising methods. Consequently, attorneys who naturally incline towards more ethical practices may either be forced out of business or compelled to deviate at least somewhat from their high standards in order to survive professionally. It is no comfort to the consumer to know that there are laws which forbid deceptive or misleading advertising, if such advertising can even be defined and identified. The consumer who patronizes a television salesman because of his deceptive and unfair advertising is out the cost of his television set or the cost of repairing it. The consumer who retains an attorney on the basis of unfair or deceptive advertising may loose his liberty or his entire business or his home. He may not even know until long after the fact or

may never learn that the attorney was dishonest or incompetent–for example, it may not be until after his death that the defect in the will or trust that the deceptive or incompetent attorney drew up becomes evident. Obviously, it is too late to do anything about it then. Obviously, too, the importance to the client of a will which does not leave his property the way he intended to leave it or a title search which does not disclose a fatal defect in his title to his new home is much more important to the client than is the results of deception, fraud, or incompetence in the average commercial transaction. The services which the lawyer provides for the consumer are far too significant to permit an advantage to be gained by dishonest, unethical, and incompetent attorneys from misleading or deceptive advertising or from the deceptive and misleading elements inherent in advertising by attorneys.

Advertising by professionals, and especially by attorneys, is widely said to be inherently deceptive and misleading. In fact, some commentators go so far as to say that all advertising is inherently deceptive.

> "The major part of informative advertising is, and always has been, a campaign of exaggeration, half truths, intended ambiguities, direct lies, and general deception. Amongst all the hundreds of thousands of persons engaged in the business, it may be said about most of them on the informative side of it that their chief function is to deceive buyers as to the real merits and demerits of the commodity being sold." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, 214 (1969).

While one need not go so far as to condemn all advertising as necessarily misleading and deceptive,

advertising by attorneys certainly presents a special case for the argument that any advertising which might be allowed would be inherently deceiving and misleading, or that at the very least the impossibility of separating the misleading from the non-misleading and enforcing such restrictions necessitates the advertising prohibition. The informative aspects of any advertising by attorneys would be outweighed by the inherent dangers of misleading, confusing, and ultimately leaving the consumer worse off than if advertising remains prohibited.

> "The ABA expresses a concern that legal-fee advertising will be very confusing and will cause much misrepresentation. The basis for this concern is that the legal profession is faced with the uncertainty of not knowing of all the particular acts that will be needed for a given service. The Lawyer's work product and legal fee will depend also on intangibles such as the ingenuity of the lawyer, the access to certain legal research and the lawyer's court experience. The State contends these services are so abstract any type of legal fee advertising would result in misrepresentation by the lawyer."
> Note, "Advertising of Professional Fees: *Does* the Consumer Have a Right to Know?" 21 S.D. L. Rev. 310, 328 (Spring 1976), citing 22 UCLA L. Rev. 483, 508 (1974).

"The sale of legal services has all the characteristics of a market rife with opportunities for consumer deception. Consumers can normally deter false advertising either by refusing to buy after an initial inspection or by refusing to make a repeat purchase after an unsatisfactory experience with a product. In some markets, however, the

> nature of the product robs consumers of both sanctions. The sale of infrequently purchased goods, such as funerals, encyclopedias, or swimming pools, the qualities of which cannot be tested in advance, invite false advertising because of little risk of consumer retaliation. Similarly, individual clients cannot inspect the quality of an attorney in advance, and they do not often repeat their purchases of legal services. The only economic check on consumer deception would be the danger that a defectively advertised product might acquire a bad reputation." Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and solicitation by Attorneys," 62 Virginia L. Rev. 1135, 1160 (Oct. 1976).

Advertising by attorneys is inherently misleading or deceptive because consumers cannot evaluate the quality of legal services. The very nature of law as the providing of services requiring a specialized type of learning preventing the average consumer from knowing with any certainty whether any legal action is necessary, what legal action would be necessary, and whether it is adequately performed. If the consumer sees an advertisement that a simple trust will be established for X dollars, he may rush out to get a trust set up for his children. If the attorney who placed this advertisement simply drafts the trusts as the clients come in requesting them, how will the clients ever know whether they really needed a trust or whether some other testamentary of inter-vivos gift device might have better suited their needs? If the trust is faulty but never challenged, the consumer may never know that the trust would not have held up if anyone with standing had properly asserted its invalidity. The trust may in fact actually be successfully challenged, but the challenge may not come until after the client's death. If an attorney

advertises uncontested divorces for X dollars, how does the client know whether the attorney is simply obtaining for him an uncontested divorce because he requested it, or whether the attorney will properly explore, evaluate, and ascertain the needs of the client even if they prove not to be consistent with the client's initial request for a simple and uncontested divorce? If the attorney wins a lawsuit for the client, how can the client know whether the lawsuit was so simple that anyone could have won it, or whether the attorney did brilliant legal work which may have been necessitated because of the faulty legal work of a lawyer previously hired by the attorney? If the attorney loses a case for the client, how does the client know whether the loss is due to the incompetent representation by the attorney or simply because the case was not one in which the client could reasonably expect victory?

The critics of the advertising prohibition seek to provide answers for the objections to allowing attorneys to advertise. For example, it is said that one never knows the quality of anything to a certainty. One has to judge the lawyer or the color television by looks, reputation, and other factors which may seem relevant to the consumer. James G. Frierson, *"Legal Advertising"*, 2 Barrister 6 (Winter 1975). However, one can tell whether or not a color television works. One can also make some sort of judgment about the clarity of the picture of a color television. One cannot simply look at a lawyer and decide on any appropriate basis that he is a good lawyer or a bad lawyer. Even after he has done work for the client, it is not often possible to be sure that he has done a good job or a bad job. Moreover, one is likely to have a better idea whether or not one wants a color television than whether or not one wants a testamentary trust set up for his children.

At least one should be able to find out the price of legal services, it is argued. See, e.g., Monroe H. Freedman, "Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility," 4 Hofstra L. Rev. 183 (Winter 1976); James G. Frierson, "Legal Advertising", 2 Barrister 6 (Winter 1975); Allen V. Morrison, "Institute on Advertising within the Legal Profession–Pro", 29 Okla. L. Rev. 608, 617-18 (Summer 1976); Note, "Goldfarb v. Virginia State Bar–Applying the Anti-Trust Laws to the Legal Profession", 19 Howard L. J. 149, 157 (Spring 1976). It is frequently said that certain types of legal services are more or less standardized so that their prices can be advertised in a meaningful way. For example, the simple uncontested divorce without any questions of property settlement or child custody is often cited as a type of service which lends itself to price advertising. However, here we once again run into the problem that the consumer may not know whether what he needs is really the "simple uncontested divorce". If he selects an attorney on the basis of the price advertised for the "simple uncontested divorce," and it turns out that what he needs is a more complicated action, he may have been misled drastically by the advertisement of prices for this supposedly standardized service. On the other hand, he may insist on getting the simple uncontested divorce that he asked for and may well regret it later on. Either way, the consumer has not been helped by the advertising of prices for this service.

Even the so-called "simple uncontested divorce" may not mean the same thing to one lawyer as it does to another. If the client has previously been to another attorney and negotiated a settlement or proposed settlement agreement, will the divorce remain the same "simple uncontested divorce" to the new attorney who was asked to obtain the divorce on the assumption that this agreement

will be incorporated into it? If so, is the attorney taking the responsibility that he should assume for examining this proposed agreement and determining its desirability and validity before obtaining the client's divorce with the agreement incorporated into it? If the other spouse is not available and has to be tracked down, will the client consider this still a simple uncontested divorce, or will he understand if the attorney charges extra for additional work created by the unavailability or difficulty in finding the other spouse? If additional significant legal complications arise, will the fees that the attorney charges for those additional matters be sufficiently higher than other attorneys that the client feels he has been deceived or cheated?

Suppose an attorney advertises a "simple will" for a set fee. It seems likely that a significant percentage of people who come to the attorney to have a "simple will" drawn up for that set fee will actually need a more complicated will or some other type of testamentary device instead of or to supplement the will. Let us hope that the attorney will not be considered guilty of "bait and switch" tactics for advising the client that what he really needs is not the "simple will", but a very different type of legal instrument or instruments. Obviously, the average layman does not know what his needs are before he walks into an attorney's office. He is likely to feel cheated and be misled by advertising of a particular legal service performed for a set price when it turns out that the attorney recommends to him some other, perhaps much more expensive legal service.

The "simple will" illustration demonstrates the impossibility of having effective and truly informative advertising of legal fees. What is involved in a "simple will"? Surely each attorney will have a different idea as to what constitutes a "simple will", and even a single attorney would have difficulty in defining it and drawing a precise

line. The alternative suggested for problems of this type is to advertise an hourly rate, with perhaps a range of hours which might be involved or an average number of hours and an hourly rate might be used. See, e.g., James G. Frierson, "Legal Advertising", 2 Barrister 6 (Winter 1975). But even the simplest transactions can vary very substantially in the amount of time required. If an attorney advertises an hourly rate of $30.00 and an average of two (2) to ten (10) hours for a particular transaction, the consumer who might feel that he can afford $60.00 may find $150.00 prohibitive. How does he know whether he can afford the service or whether the service is worth that much to him until after it has been performed or at least until the attorney has charged him for a half-hour to one hour consultation?

Yet another problem with the hourly rate is that the client cannot know how efficiently the attorney will perform the service. Without even considering the question of the quality of the work done, how does the client know whether the attorney is generally a fast worker or a slow worker? How does he know how much difference it will make if the attorney is a young one without a great deal of experience? How does he know whether even the experienced attorney may not run into some particular aspect which is unfamiliar to him and which may greatly increase the time necessary for providing the service? All these objections do not mean that price advertising could never be of any use to any consumer. But they do point out significant problems with the idea that price advertising will permit the consumer to make an intelligent choice on the basis of the csot of the service to be provided. The value of price advertising is obviously less in relationship to legal services than it is for most products. When viewed in the light of serious problems connected with the lifting of any advertising prohibition, the decreased informative value to the consumer because of the nature of the legal

profession and legal services is an important factor for consideration.

> "I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are 'misleading' and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases." *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council,* ____ U.S. ____, 96 S.Ct. 1817, 1832, 48 L. Ed. 2d. 346 (1976) (Burger, J. concurring).

Thus, we have the conclusion that the advertising of legal services is inherently misleading and deceptive or so susceptible of being misleading and deceptive that it should not be permitted. Critics of the advertising prohibition do not agree with this assertion, but at least a vast majority of the critics assume that advertising by lawyers, doctors, and other similar professional groups requires strict regulation and must be viewed differently from advertising of products by the ordinary commercial businessmen. Unfortunately, this is more easily said than done. While the Bar can easily and readily enforce an absolute ban on advertising, it is much more difficult if not impossible for it to enforce a ban on misleading or deceptive advertising.

> "Since laymen often may not know they have been deceived, the bar could not rely on consumer complaints to alert authorities to deceptive practices. Moreover, consumer ignorance would increase the number of claims that could seem deceptive. Many true claims might be misleading. For example, the assertion 'my wills have been

> upheld by the Supreme Court three times' implies competence but in fact may reflect incompetence: if the wills had been clearly drafted, they might never have been contested. In addition, bar regulation of advertising could encourage consumers to believe the advertisements that are published. As a result, the advantages of using deceptive advertising might actually increase." Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys," 62 Va. L. Rev. 1135, 1172 (October 1976).

Regulation of fraudulent, deceptive, and misleading advertising could only help consumers after the fact. After they are injured, they might hope to recover some of their loss if any could be proved or to have the satisfaction of having the attorney disciplined in some way. Statement of R. William Ide, III, Chairman, Young Lawyers Section of the ABA to the ABA Standing Committee on Ethics and Professional Responsibility (October 31, 1975). Suits by individual consumers would not be of significant value in enforcing restrictions on misleading and deceptive advertising in the overview. First, the claim must be large enough to warrant the consumer's bringing a suit. Second, the consumer would have to prove the misleading or deceptive advertising by the attorney. Third, presumably some requirement would remain to establish causation and actual loss. All these factors would prevent consumer suits and recoveries from serving as a significant check and sanction on misleading and deceptive advertising by attorneys. Obviously, some other enforcement mechanism is needed.

> "Of course, the determination of what is or is not untrue or deceptive will often be difficult. Bar ethic committees and state courts will frequently

have to decide when vagueness, ambiguity, exaggeration, or failure to disclose constitutes deception. In determining whether an advertisement is untrue, data, statistics, and expert testimony will often be in conflict. Fortunately, a body of law exists which should prove a useful guide in developing standards for legal advertising. Since 1914 the Federal Trade Commission has asserted jurisdiction over, and has ruled on, an extraordinaarily wide range of deceptive advertising cases. The FTC opinions cannot be rotely applied, however, because legal advertising presents a special case and in these two ways. One of the FTC's most important insights is that what constitutes deception depends upon the area being regulated. This is particularly significant regarding legal advertising. Mis-statements which are overlooked or deemed unimportant in other advertising may be inappropriate in legal advertisements because the public lacks sophistication concerning legal services and may therefore be more easily deceived." Note, "Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available," 81 Yale L. J. 1181 (1972).

Thus, even those who advocate that only misleading and deceptive advertising be forbidden recognize the difficulty of determining what is deceptive in the context of lawyer advertising. Also, there is no doubt that advertising by attorneys must be subjected to different standards from advertising by the ordinary commercial entrepreneur. Consider the size of such agencies as the Federal Trade Commission and the Federal Commerce Commission. Then consider how closely lawyer advertising would have to be watched in order to catch individual violations of

restrictions against deceptive and misleading advertising, not simply practices common in the profession or advertising which constituted a particular glaring violation of the restrictions because of the nature and size of the advertiser or because of the nature of the advertising itself. It is clear that the Federal Trade Commission itself could not regulate lawyer advertising, both because it could not reach any advertising by attorneys which was not deemed to be subject to the interstate commerce power and because it simply does not have the resources to monitor the 236,000 lawyers in active practice at present, including some 37% in solo practice. Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Soliciation by Attorneys." 62 Va. L. Rev. 1135, 1170 (October 1976); ABA, The 1971 Lawyers Statistical Report 10 (1973). The obvious alternative is for the State Bars to shoulder the burden of regulating advertising by attorneys. See, e.g., Statement of R. William Ide, III, Chairman, Young Lawyer's Section of the ABA, to ABA Standing Committee on Ethics and Professional Responsibility (Oct. 31, 1975). But as J. Rex. Farrior, Jr., President of the Florida Bar Association, wrote in the March issue of the Florida Bar Journal:

> "Advertising will lead to abuses which will be impossible to police. Not only would advertising of professional services lend itself to misleading statements far more readily than most of the advertising which currently demands constant investigation, but proper regulation of advertising in such a subjective area would be an impossible task, *requiring manpower and resources totally unavailable under our present dues structure.*" Quoted in Barbara A. Stein, "Is Professional Advertising Unprofessional?" 12 Trial 26, 36 (June 1976) (Emphasis Added).

It should require no lengthy discussion of authorities in support of the proposition that State Bars are not currently equipped, either in number, nature, or finances, to police attorney advertising as would be required if restrictions simply prohibited misleading and deceptive advertising.

Thus, to allow attorneys to advertise as long as their messages were neither misleading or deceptive would create an almost insuperable dilemma. As even critics of the advertising prohibition have recognized, advertising by attorneys would have to be carefully scrutinized and subjected to different and properly much more rigorous standards than ordinary commercial advertising. Yet the resources are not now available to police attorney advertising in this manner, and the cost of establishing the manpower and services necessary for such policing functions is prohibitive. The likely result would be that lawyers would be able to advertise with only a rather cursory watch being kept on the nature and quality of their advertising and only random violators being subjected to sanction. In view of the strong arguments that advertising by attorneys is inherently deceptive and misleading, or at the very least that it is virtually impossible to distinguish the deceptive and misleading from the non-deceptive and non-misleading, the idea of allowing attorneys to advertise as long as they steer clear of deceptive and misleading messages is totally unacceptable.

What effect would lifting the ban on advertising have on the competitive relationships among lawyers and the ability of new practitioners to enter the field successfully? It has been argued that the ban on advertising makes it difficult for new lawyers to build up a practice and operate as a barrier to entry into the profession. But it is not at all clear that permitting advertising would allow new lawyers to use advertisements to build up a practice more easily and more quickly.

"A barrier might persist even after the bans were lifted. The number of cases in which a new attorney is as competent as an established lawyer probably is very small. New attorneys may lack the collective good will of the local courts and bar, a vital asset in rendering some legal services. Further, young attorneys are unschooled in the practical assets of the practice. To the extent that consumers will possess and rely on accurate information about the market, lifting the advertising ban might do little to help new attorneys establish themselves in the market. In addition, even if the rules were abolished, economies of scale and marketing could work as an equally pernicious barrier to entry against any except the largest new firms. As a result, the barrier effect alone should not make the restrictions on lawyer advertising and solicitation unreasonable." Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys," 62 Va. L. Rev. 1135, 1165 (October 1976).

Professor Lees and other complain that the rules against touting, advertising and undercutting operate in favour of firms already established and prevent newcomers using what are the 'normal competitive devices of new entrance.' This argument cuts both ways, since if newcomers enter a field where costs are inflated by the need to indulge in large-scale advertising they will need more initial capital or bridging finance to cover the period before fees begin to flow in. Harris and Seldon point out that in a number of industries 'advertising has been used with the intention of

> stopping or discouraging new competitors.' The American economist, Gideonse, alleged that advertising entrenched monopoly by setting up a financial barrier to the competition of new and small firms." Bennion, *Professional Ethics: "The Consultant Professions and Their Code* p. 211 (1969)

The concept that the cost of advertising may represent a barrier to entry into a new field has been recognized as a factor to consider in evaluating the reasonableness of particular commercial activities in the anti-trust field. *See e.g., Sulmeyer v. Coca Cola Company*, 515 F.2d. 835 (5th Cir. 1975), cert. den. 424 U.S. 934 (1976). The fear that the need for and cost of advertising could present a serious obstacle to the young lawyer has been shared by prominent members of the profession. For example, Massachusetts Academy of Trial Lawyers' President, James G. Reardon, had commented that advertising "would be most unfair to those least able to afford it–the young practitioner just launching his career who has no allowance in his budget for an expensive campaign." Stein, "Is Professional Advertising Unprofessional?" 12 Trial 26, 37 (June 1976).

We would have to shut our eyes to reality to ignore the fact that advertising costs money. In contrast to many other professions such as medicine and dentistry, law requires a relatively small amount of capital in order to enter the field. If other attorneys are advertising, the lawyer just entering the field would most need advertising in order to bring his name before the public which would already be familiar with the names of other practitioners who had the advantage of both their advertising campaigns and the fact that they had been in practice long enough to establish a reputation in the community. The need for advertising would require that the young lawyer begin with a good deal more capital and might deter or make it difficult, if not

impossible, for some young lawyers without that capital to build up a practice.

The cost of advertising would not only represent a barrier to entry in the field, but it would necessarily increase the cost of legal services. Even if advertising brings in more clients and more business to the attorney, the cost of providing services is likely to increase.

> "The purely economic argument runs as follows. Professional services differ from manufactured goods in that they are rendered individually and thus are not susceptible to the economies of standardization and mass production. The argument that advertising increases demand and enables economies of large-scale production to be achieved therefore does not apply." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, p. 153 (1969).

There is a significant limit on the extent to which advertising can increase the demand for services of attorneys. Advertising of a good product which is reasonably within the financial reach of most consumers can generate a very large demand for the product. Advertising of uncontested divorces, for example, cannot create the same demand for the legal service of obtaining a divorce for the simple reason that there are only a finite number of persons who need a divorce, and presumably most of these people will obtain a divorce even without advertising. It is also questionable whether advertising of attorneys' services would benefit the public if it did indeed create a demand for their services which did not exist before. Giving someone the idea of getting a divorce simply because the cost is not prohibitive and it seems an easy way to get out of marital difficulties is not a desirable role for the legal profession.

Thus, advertising by attorneys cannot and should not increase demand for services in the same way that advertising of a product may. Moreover, unless the attorney has a very small practice before advertising, he will not significantly decrease his cost for a particular service by obtaining more clients. If he is already obtaining as much business as he can handle and advertises simply to maintain his competitive position, the advertising costs will simply be added on to the cost of legal services. If he significantly increases his business so that he cannot handle it all himself, then he will need to associate himself with another attorney and thus absorb all or most of the increased profit he would otherwise have obtained. "Surveys of businessmen and economists show no consensus on the general question whether the price for a product is higher or lower as a result of advertising." Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys," 52 Va. L. Rev. 1135, 1166 (October 1976). If this is true even in the ordinary commercial field, how much more true will it be for advertising of legal services?

Even if attorneys are simply advertising prices and not urging people to come get their divorce today, the same arguments apply. In fact, to the extent that price advertising is simply informative and not intended to generate increased business, it is even more likely that advertising will simply increase the cost of the service to the consumer. If price advertising makes attorneys more competitive price-wise, as some advocates of advertising argue, the pressure on attorneys to reduce prices of at least some services may be intolerable. Do we really want to see price wars among attorneys? Do we want attorneys to price some services at a loss and make up the loss in supplying other services? Practices which may be permissible in relationship to the advertising and sale of products are not necessarily desirable when it comes to the advertising and delivery of legal

services. If the pressure of advertising causes attorneys to reduce prices unduly, then either the attorneys are operating at a loss and will eventually be driven out of the practice of law or they will necessarily reduce the quality of services. See, e.g., Statement of R. William Ide, III, Chairman, Young Lawyers Section of the ABA to ABA Standing Committee on Ethics and Professional Responsibility (October 31, 1975); Stein, "Is Professional Advertising Unprofessional? 12 Trial 26, 37 (June 1976).

> "If costs then increase, and charges (and therefore income) are reduced, can we really believe, with Professor Lees, that there would be no tendency for quality of service to decline? The Prices and Incomes Board said in one report that 'quality in professional work depends on professional standards', and in another that standards depend primarily on the rigour of the tests applied to the granting and taking away of qualifications. If they are insufficiently remunerated, professional people will either be forced out of private practice or will lower their standards to enable costs to meet income. No other conclusion is possible." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, 210-11 (1969).

Advertising by attorneys, even if it is simply pure price advertising, presents serious questions about its effect on the cost and quality of legal services and the difficulty of new attorneys in building up a practice. We cannot simply dismiss these concerns out of hand. These concerns, and all the other problems associated with advertising by attorneys, make it clear that if advertising were permitted, it would require complicated and extensive restrictions and an expensive and time-consuming mechanism of enforcement. It is doubtful that we could successfully define the types of

advertising that should be permitted with sufficient specificity to enable lawyers to know whether their advertisements are appropriate or inappropriate. It is also doubtful that we could successfully identify which advertisements placed by attorneys were improper and which were permissible. Even if we could do all of these things, it is extremely doubtful that we would be able to enforce all the necessary restrictions in a way that would adequately police the profession's advertising and adequately protect and compensate the consumer who may be harmed by improper advertising. Even if one does not accept the proposition that advertising by attorneys is inherently undesirable and is at least as harmful to the consumer as it is beneficial, one must recognize that devising a means of permitting restricted advertising with the necessary safeguards is impossible. The only way successfully to prevent deceptive and misleading advertising and harm to the public and the profession which would result from improper advertising is to prohibit advertising by attorneys.

C. ADVERTISING RESTRICTIONS ON ATTORNEYS DO NOT VIOLATE THE FIRST AMENDMENT.

There is now no longer any doubt that advertising is within the scope of the protection of the First Amendment to the United States Constitution. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, ____ U.S. ____, 96 S.Ct. 1817, 48 L. Ed2d. 346 (1976). Accord, *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 96 S.Ct. 2440, 49 L. Ed.2d 310 (1976). The recent unambiguous determination that commercial speech or advertising is protected by the First and Fourteenth Amendments merely affirms the implication of a significant line of earlier cases by this Court. E.g., *Bigelow v. Virginia*

421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600 (1975); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed. 2d. 669 (1973); *Rowan v. United States Post Office*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed. 2d. 736 (1970); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d. 686 (1964). This lays to rest the inference drawn from some cases that commercial speech or advertising was not protected by the First Amendment. See, e.g., *Breard v. City of Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); *Valentine v. Chrestenson*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1278 (1942).

The determination whether advertising prohibitions on attorneys violate the First Amendment does not simply stop with the conclusion that advertising or commercial speech is within the scope of First Amendment protection. As noted by this Court, "We have recently held that the First Amendment affords *some* protection to commercial speech. We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection." *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976).

> "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. . . . To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d. 600 (1975) (citations omitted).

Whether speech is commercial or non-commercial, it is necessary to balance the First Amendment interest against the strength of the public interest asserted. E.g., *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 2235, 44 L.Ed. 2d 600 (1975); *Rowan v. United States Post Office*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed. 2d. 736 (1970); *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).

In weighing or balancing the interest of the State in regulating attorneys and protecting the public asserted to support the proscription on advertising against the consumer's "right to know", we must recognize that commercial speech, and particularly advertising by professionals such as lawyers, involves special problems which require a different approach.

"As Mr. Justice Stuart pointed out in *Virginia Pharmacy Board v. Virginia Consumer Council*, the 'difference between commercial price and product advertising . . . and ideological communication' permits regulation of the former that the First Amendment would not tolerate with respect to the latter." *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 96 S.Ct. 2440, 2451, 49 L.Ed. 2d 310 (1976).

"In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common sense differences between speech that does 'no more than propose a commercial transaction' Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S., at 385, 93 S.Ct. at 2558, 37 L.Ed. 2d, at 676-677, and other varieties. Even if the

> differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ____ U.S. ____, 96 S.Ct. 1817, 1830, 48 L.Ed. 2d. 346 (1976).

If commercial speech generally is evaluated differently for the First Amendment purposes from speech which is purely intended to communicate ideas, advertising by professionals is an especially strong area for permitting State regulation and even prohibition. The authority and necessity for State to regulate professionals, and especially attorneys, cannot be doubted. (See earlier discussion in this Brief.) Even in the recent First Amendment cases, the Court has recognized this special need for the State to regulate professions. "The State, of course, has a legitimate interest in maintaining the quality of medical care provided within its borders." *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 2235, 44 L.Ed. 2d. 600 (1975).

> "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain

kinds of advertising." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ____ U.S. ____, 96 S.Ct. 1817, 1831, n. 25, 48 L.Ed. 2d. 346 (1976).

The question then becomes one of weighing the State's admitted interest in regulating the professions, and especially the legal profession, against the First Amendment interest asserted by consumers who wish to receive the information that lawyers might communicate in advertisements. Earlier portions of this Brief have set out and discussed many, although certainly not all, of the myriad reasons supporting the general prohibition on lawyer advertising. But *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, might be argued to have determined this question already. As noted by this Court itself in a footnote to that opinion, however, lawyer advertising is in many respect different from the advertising of prescription drug prices by pharmacists. In purchasing drugs from a pharmacist, the consumer is not simply reading advertisements and deciding what drug he will purchase at what price. The consumer must first have a prescription from a doctor who will determine whether any medication is advisable and, if so, exactly what medication. The advertisement does not have any significant function of attracting the consumer to the idea of buying medication in the first place or of determining which medication the consumer will purchase. Both those questions are for his physician. In contrast, there is no insulation between the attorney who advertises the price of a particular legal service and the client whom might request that service. The same attorney determines whether any legal activity is necessary, what legal activity is necessary, and the prices he will charge for his legal services. Only in a small range of situations can a consumer say I need a particular legal service and then proceed to acquire that legal service. Even if he thinks he

knows what legal services he required, it may turn out that he really does not require any legal service or that what he needs is something very different. The consumer may be misled by an advertisement quoting prices for a legal service which he believes he needs, when it turns out what he really needed is something else which another attorney could have provided at a lower fee. The consumer may tend to insist upon the particular legal service which he felt he needed and to which he was attracted by the lawyer's advertisement. Attorneys may be tempted simply to go ahead and provide for the client the service requested by the client on the basis of the attorney's advertisement rather than thoroughly exploring the problem and urging the consumer to accept or obtain some other service which might be more appropriate.

The advertising of prescription drug prices can also be distinguished from the advertising of prices for attorney's legal services in the nature of the services which they provide. Prescription drugs are largely prepackaged. In the vast majority of the cases, the pharmacist simply pours drugs prepared by the manufacturer from one bottle into another. The customer, who already has a prescription from a physician, knows that one hundred tablets of 5 milligrams of Valium purchased from one pharmacist will be identical in quality and quantity to one hundred tablets of 5 milligrams of Valium purchased from any other pharmacist, at least in the vast majority of cases. In contrast, legal services cannot be so easily defined. Since the consumer does not usually know what services he needs, he does not know what prices to compare. If he looks at an hourly rate, he does not know how long it will take one attorney to perform a task in relationship to the time that another attorney might require. He does not know the kind of attention to the problem and the types of devices that one attorney might use for the same problem in comparison to

the attention and means of resolving the client's problem that another attorney might use. There are certainly some services which are closer to being standardized than others, such as the typical uncontested or consent divorce without complication of property settlements and custody disputes which is so often cited. Even there, there will be some differences between what one attorney will include in his price and what another attorney will include in his advertised fee for supposedly the same service. And here too the consumer does not know for sure that the simple uncontested or consent divorce is what he really needs. Or he cannot be sure that complications will not arise which will require further work on the part of the attorney, which may or may not be at a price comparable to the prices that other attorneys would charge for those additional services. The problems involved in permitting price advertising of even the simple consent or uncontested divorce are evident. Few things are as close to being standardized as the simple uncontested or consent divorce. No meaningful price advertising by attorney is possible.

Since price advertising by attorneys is not meaningful in the way that price advertising by pharmacists may be, the arguments against price advertising can more easily overcome the asserted First Amendment interest. Moreover, the arguments against price advertising or any advertising by attorneys are much more numerous and much stronger than the reasons advanced against advertising by pharmacists. For the reasons stated here and in the section of this Brief on policy, we believe that any balancing of the First Amendment interest against the interest of the State in prohibiting advertising for protection of the public and maintaining the effectiveness of the legal system outweigh the First Amendment interest in advertising by attorneys.

D. ADVERTISING RESTRICTIONS ON LAWYERS DO NOT VIOLATE THE SHERMAN ANTITRUST ACT .

Advertising restrictions on lawyers, as adopted by the vast majority of the jurisdictions in the United States, do not violate the Sherman Antitrust Act. The advertising restrictions of the American Bar Association's Code of Professional Responsibility, or some modified version of them, have been adopted in all fifty states and in the District of Columbia. Note, "The Sherman Act and the American Bar Association's Ban on Advertising; Madison Avenue Will have to Wait," 10 Suffolk L. Rev. 557, 561, n. 24 (Spring 1976). In the vast majority of these jurisdictions, the advertising restrictions are specifically expressed or mandated by statute. In most of the others, the restrictions are mandatory rules adopted by the State Supreme Court pursuant to its authority to regulate the legal profession, an authority which is inherent in the nature of the judicial system and legal professions and which is generally recognized by statute. In at least 33 states, statutes provide that advertising or, more generally, solicitation constitutes criminal activity. In four other states, including Arizona, state law provides that solicitation is grounds for disciplinary action against an attorney. In four more states, the State Supreme Court has promulgated rules banning solicitation even in the absence of statutory proscription of advertising or solicitation. In only nine jurisdictions are there neither statutes nor court rules specifically barring solicitation by attorneys. Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys", 62 Va. L.Rev. 1135, 1142-43 n. 49 (October 1976). Thus, in 42 of the 51 jurisdictions, either statutory proscriptions or rules adopted by the State Supreme court, or both, specifically prohibit or restrict advertising and solicitation by attorneys.

Faced with this kind of state law authority for the great majority of state advertising restrictions on lawyers, we must examine these restrictions in light of the "State action" exception to the Sherman Act's Application. In *Parker v. Brown*, this Court held that a marketing program intended to restrict competition among California raisin growers and to maintain prices in the sale of raisins by the growers did not violate the Sherman Act since it was expressly authorized by a state law and implemented by a state commission created by the same Act. 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Court noted that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.W. 341, 350-351, 63 S.Ct. 308, 313, 87 L.Ed. 315 (1943).

The more recent case of *Goldfarb v. Virginia State Bar*, established that lawyers, or members of any profession, are not automatically exempt from the Sherman Act. 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975). *Goldfarb* expressly held that the State Bar of Virginia and the County Bar of Fairfax County had violated the Sherman Act in that the County Bar had promulgated minimum fee schedules and that the State Bar had issued opinions indicating that it clearly expected minimum fee schedules to be observed strictly if disciplinary action were to be avoided. However, in *Goldfarb* the Supreme Court of Virginia had not adopted rules establishing or requiring adherence to minimum fee schedules. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975). Additionally, the Court there noted that, although the State Bar may be a State agency for some purposes, it was essentially participating in a basically private anti-competitive activity when it required adherence to minimum fee schedules. Of course, the County Bar was clearly not acting as a sovereign

authority of the State in promulgating its minimum fee schedules.

> "The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790, 95 S.Ct. 2004, 2015, 44 L.Ed. 2d. 572 (1975).

The State action exemption applies when the activity is "*compelled* by direction of the State acting as a sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790, 95 S.Ct. 2004, 2015, 44 L.Ed. 2d 572 (1975) (emphasis added).

Advertising restrictions regulating the conduct of attorneys are in the vast majority of jurisdictions clearly within the "State action" exemption from the Sherman Antitrust Act. Since they are generally embodied in State statutes or Supreme Court rules or both, they are unquestionably compelled by the State in its capacity as sovereign, not simply actions of a regulatory agency without the necessary legislative direction. As previously mentioned, for example, North Carolina General Statute §84-38 makes it illegal to solicit legal business. Additionally, North Carolina General Statute §84-21 authorizes the Supreme Court of North Carolina to accept rules submitted to it by the State Bar and, by entering those rules upon its minutes, give them the force and effect of law. In North Carolina General Statute §84-28, grounds for discipline of a member of the North Carolina State Bar are listed and include the violation of the Code of Responsibility adopted and promulgated by the State Bar. Similarly, Arizona Revised Statutes Annotated, § 32-257(7) provide that solicitation is a ground for discipline, and the disciplinary rules of the

State Supreme Court forbid a lawyer to publicize himself, his partner, associate, or any other lawyer affiliated with him or his firm as a lawyer. As indicated above, North Carolina and Arizona's regulatory schemes are typical of the vast majority of jurisdictions in the United States. Consequently, advertising restrictions in almost all jurisdictions are clearly within the most narrowly-limited definition of the "State action" exemption. (The more recent case of *Cantor v. Detroit Edison Company*, 96 S.Ct. 3110 (1976), does not in any way cast doubt upon this statement. That case dealt with private action and the extent to which it was authorized or required by action of the State in its sovereign capacity. Here we are dealing clearly with a challenge to the action of the State in its sovereign capacity and to the actions of State officials in carrying out the sovereign command.)

Even if the "State action" exemption were not applicable, advertising restrictions on lawyers still would not violate the Sherman Act.

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 326, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086

> (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' See Sperry v. Florida, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d. 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d. 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed. 2d. 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975).
>
> "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 n. 17, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975).

As indicated by the court in *Goldfarb*, mechanical application of traditional antitrust rules to State regulation

of professional activity is inappropriate. The purposes of State law regulation of the legal profession include the promotion of the administration of justice and protection of consumers. These aims of State regulation of legal activities, plus the novelty of applying Sherman Antitrust concepts to the professions, require careful analysis of the purpose of the Sherman Act and the purposes, policies, and effects of the State law regulation in order to apply the Sherman Act to the restrictions against advertising or solicitation by attorneys. Either a "rule of reason" approach or a new method of analysis is necessary to evaluate restrictions on lawyers' advertising in relationship to the Sherman Act, should the "State action" exemption not be considered to immunize the restrictions from the Sherman Act. Discussion of the purposes and effects of the advertising restriction for purposes of evaluation under the Sherman Act would inevitably overlap and duplicate the discussion of the purposes and effects of advertising restrictions in relationship to the First Amendment claim. Consequently, I have not tried to separate them and will not discuss the merits of the advertising restrictions here. However, I believe the argument as to the effects of advertising restrictions and the policies they promote will inevitably support the conclusion that, whether analyzed under the traditional "rule of reason" approach or under some other scheme adopted for purposes of this novel application of the Sherman Act to professions, advertising restrictions on attorneys do not violate antitrust laws reviewed in the context of the special role of attorneys in the system of justice, the services attorneys provide, the principles and organization by which attorneys are regulated, and the purposes and policies sought to be achieved through advertising restrictions.

CONCLUSION

For the reasons set forth herein, State prohibitions against advertising by attorneys should be upheld.

Respectfully submitted, this 17th day of December, 1976.

RUFUS L. EDMISTEN
ATTORNEY GENERAL
STATE OF NORTH CAROLINA

ANDREW A. VANORE, JR.
Senior Deputy Attorney
Attorney General

NORMA S. HARRELL
Associate Attorney General

H.D. COLEY, JR.
Counsel for North Carolina
State Bar
Post Office Box 25850
Raleigh, North Carolina 27611

HARRY W. McGALLIARD
Of Counsel
Post Office Box 25850
Raleigh, North Carolina 27611

Counsel for the State of
North Carolina
Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Tele: (919) 829-7387

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I have this day served a copy of the attached Brief of the State Bar of North Carolina as Amicus Curiae in Support of the State Bar of Arizona upon the following:

Mr. William C. Canby, Jr.
Attorney at Law
413 East Loyola Drive
Tempe, Arizona 85282

Attorneys for Appellants

Mr. John P. Frank
Lewis and Roca
Lawyers
First National Bank Plaza
One Hundred West Washington Street
Phoenix, Arizona 85003

Mr. Orme Lewis
Lewis and Roca
Lawyers
First National Bank Plaza
One Hundred West Washington Street
Phoenix, Arizona 85003

by depositing a copy of same in the United States Mail, postage prepaid, this 17th day of December, 1976.

Respectfully submitted.

RUFUS L. EDMISTEN
ATTORNEY GENERAL
STATE OF NORTH CAROLINA

Andrew A. Vanore, Jr.
Senior Deputy Attorney General